83-623

No.

Office-Supreme Court, U.S.
F I L E D
OCT 14 1983
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1983

FRANK B. JAMES, ET AL.
PETITIONERS

v.

JAMES G. WATT, ET AL.
RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

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October 14, 1983

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Questions Presented

1. Did the First Circuit err by holding that, irrespective of the federal Constitution and federal sovereignty, Massachusetts, as one of the 13 original States, working through its general police powers and so-called fee title to Indian lands within its borders, can unilaterally terminate a federal Indian tribe, emancipate tribal members from federal guardianship, release tribal land from federal alienation restriction, extinguish Indian title and convert a federal tribe into a state municipality?

2. Did the First Circuit err by holding that individual Indians, relying on federal Indian common law, the Constitution and the Indian Nonintercourse Act, do not have standing for themselves, their class or their tribe, to seek a declaration of tribal status as a foundation for declarations of their derivative rights to commons in tribal lands, hunting, fishing and other tribal assets?

3. Did the First Circuit err by upholding the district court's unreasoned denial of petitioners' motion to amend their complaint?

Table of Contents

Questions Presented i

Table of Authorities iv

Opinions Below 1

Jurisdiction 1

Constitutional and Statutory Provisions Involved 2

Statement of the Case 2

Reasons for Granting the Writ 5

I. The decision below directly conflicts with this Court's continuous assertion of absolute federal control over extinguishing Indian title in its *Johnson v. McIntosh*, *Worcester v. Georgia*, *Cherokee Nation v. Georgia*, *United States v. Santa Fe Pacific R. Co.*, *Oneida Indian Nation v. County of Oneida* and *Wilson v. Omaha Indian Tribe* decisions. 6

II. The decision below directly conflicts with this Court's continuous assertion of exclusive federal control over emancipating Indians and terminating Indian tribes and Indian reservations in its *United States v. Rickert*, *United States v. Holliday*, *United States v. Nice* and *DeCouteau v. District County Court* decisions. 11

A. In addition, the decision below directly conflicts with like assertion in Second and Fourth Circuit decisions. 13

III. The decision below directly conflicts with this Court's holding the 1834 revision of the Indian Nonintercourse Act releases only reserved individual parcels of detribalized treaty land from federal alienation restriction in its *Jones v. Meehan* decision. 14

A. In addition, the decision below directly conflicts with Attorney General Garland's 1886 opinion and Interior Department's longstanding (100 year) policy that the Nonintercourse Act prohibits federally unauthorized transactions in tribal land by individual Indians as well as by their tribes. 18

IV. The decision below directly conflicts with this Court's recognition of individual Indian standing to protect derivative interests in tribal assets in its *Fellows v. Blacksmith* and *McClanahan v. Arizona State Tax Commission* decisions. 19

A. In addition, the decision below conflicts with like recognition in Eighth and Ninth Circuit decisions. 21

V. The decision below directly conflicts with this Court's recognition that protection of Indian possessory rights works primarily through federal common law and the federal constitution in its *Oneida Indian Nation v. County of Oneida* decision and its acceptance of the Justice Department's recommendation to decline review in *Mohegan Tribe v. Connecticut*. 23

VI. The decision below directly conflicts with this Court's policy of liberal pleading amendment in its *Foman v. Davis* decision. 26

Conclusion 27

Appendix A A1

Appendix B B1

Appendix C C1

Appendix D (Separate submission at time of filing)
1. Complaint
2. Federal Answer
3. Morse Report
4. McKenney Report
5. Congressional Report
6. Schoolcraft Report
7. Earle Report

Table of Authorities

CASES

Alonzo v. United States, 249 F.2d 189 (10th Cir. 1957), cert. denied, 355 U.S. 940 (1958) 10, 12

Cayuga Indian Nation v. Cuomo, 565 F.Supp. 1297 (N.D.N.Y. 1983) 11, 25

Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831) 7

DeCouteau v. District County Court, 420 U.S. 425 (1975) 11, 12

Fellows v. Blacksmith, 60 U.S. (19 How.) 366 (1857) 21, 23

Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810) 7

Foman v. Davis, 371 U.S. 178 (1962) 27

Haile v. Saunooke, 246 F.2d 293 (4th Cir. 1957), cert. denied, 355 U.S. 893 (1957) 14

Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823) 7, 10

Jones v. Meehan, 175 U.S. 1 (1899) 15, 16, 17, 18, 19

Kenyon v. Nichols, 1 R.I. 106 (1848) 23

Kimball v. Callahan, 590 F.2d 768 (9th Cir.), cert. denied, 444 U.S. 826 (1979) 22

Lone Wolf v. Hitchcock, 187 U.S. 553 (1903) 26

Mason v. Sams, 5 F.2d 255 (W.D. Wash. 1925) 22

McClanahan v. Arizona State Tax Commission, 411 U.S. 164 (1973) 12, 21, 23

Mohegan Tribe v. Connecticut, 638 F.2d 612 (2nd Cir. 1980), cert. denied, 452 U.S. 968 (1981) 24

New Mexico v. Mescalaro Apache Tribe, 51 U.S.L.W. 4741 (U.S. June 13, 1983) 11

Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974) 5, 7, 10, 12, 14, 23-24

Oneida Indian Nation v. New York, 691 F.2d 1070 (2nd Cir. 1982) 9

Rice v. Olson, 324 U.S. 786 (1945) 12

Shulthis v. McDougal, 170 F. 529 (8th Cir. 1909), app. dismissed, 225 U.S. 561 (1912) 21

Sohappy v. Smith, 302 F.Supp. 899 (D.Or. 1969), aff'd and remanded, 529 F.2d 570 (9th Cir. 1976) 22

Thomas v. Marshfield, 27 Mass. (10 Pick.) 364 (1830) 23

United States v. Boyd, 83 F. 547 (4th Cir. 1897) 14

United States v. Boylan, 265 F. 165 (2nd Cir. 1920) 13

United States v. Charles, 22 F.Supp. 346 (W.D.N.Y. 1938) 13

United States v. Franklin County, 50 F.Supp. 152 (N.D.N.Y. 1943) 11

United States v. Holliday, 70 U.S. (3 Wall.) 407 1866) 11, 12, 20

United States v. Kagama, 118 U.S. 375 (1886) 10, 12, 23

United States v. Nice, 241 U.S. 591 (1916) 11

United States v. Rickert, 188 U.S. 432 (1903) 11, 12

United States v. Santa Fe Pacific R. Co., 314 U.S. 339 (1941) 7

Wilson v. Omaha Indian Tribe, 442 U.S. 653 (1979) 7

Worcester v. Georgia, 31 U.S. (6 Pet.) 519 (1832) 7

CONSTITUTIONAL PROVISIONS

U.S. Const. Art. 1, § 8, cl. 3 2
U.S. Const. Art. I, § 10, cl. 1 2
U.S. Const. Art. II, § 2, cl. 2 2
U.S. Const. Art. VI, cl. 2 2

STATUTES

Act of July 22, 1790, ch. 33, section 4, 1 Stat. 138 15
Act of June 30, 1834, ch. 161, 4 Stat. 729 15
5 U.S.C. § 701 2
25 U.S.C. § 177 2, 3, 6, 15
28 U.S.C. § 1254(1) 2
28 U.S.C. §§ 1331, 1337, 1343 2
1869 Mass. Acts c. 463 5
1870 Mass. Acts c. 213 5

RULE

Supreme Court Rule 17 2

OTHER AUTHORITIES

Brief of the United States as Amicus Curiae, Connecticut v. Mohegan Tribe, U.S. Sup. Ct. No. 80-1365 (1981)
F.G. Hutchins, Mashpee: The Story of Cape Cod's Indian Town (1979) 8
Felix S. Cohen's Handbook of Federal Indian Law (1982 ed.) 22-23
F.S. Cohen, Indian Rights and the Federal Courts, 24 Minn.L. Rev. 145 (1940) 22
Proclamation of King George III (1763) 9
2 Ops. Atty. Gen. 587 (1833) 15
18 Ops. Atty. Gen. 486 (1886) 16, 18, 20
Op. Sol. I.D., November 21, 1942 18, 20

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FRANK B. JAMES, ET AL.
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JAMES G. WATT, ET AL.*
RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

Petitioners Frank B. James et al. pray that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the First Circuit entered in this case on August 24, 1983.

Opinions Below

The opinion of the United States Court of Appeals for the First Circuit is docketed as No. 83-1026, *Frank B. James, et al. v. James G. Watt, et al.*, *see* App. A. The opinion of the District Court for the District of Massachusetts is docketed as Civil Action No. 81-3204-Mc. *See* App. B.

Jurisdiction

The judgment of the United States Court of Appeals for the First Circuit was entered on August 24, 1983. This petition was filed within ninety days thereof. This Court has jurisdic-

* See List of Parties, Appendix C.

tion under 28 U.S.C. § 1254(1) and under Sup. Ct. R. 17.

Constitutional and Statutory Provisions Involved

"The Congress shall have the power . . . to regulate Commerce . . . with the Indian Tribes." U.S. Const. Art. 1, § 8 cl. 3.

"No state shall enter into any treaty. . . ." U.S. Const. Art. 1, § 10, cl. 1.

"He [the President] shall have the Power, by and with the Advice and Consent of the Senate, to make Treaties. . . ." U.S. Const. Art. II, § 2, cl. 2.

"This Constitution, and the Laws of the United States which shall be made in pursuance thereof . . . shall be the supreme Law of the land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. Art. VI, cl. 2.

"No purchase, grant, lease, or other conveyance of land, or of any title or claim thereto, from any Indian Nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution." 25 U.S.C. § 177.

Statement of the Case

The original proceeding is an action by 102 petitioners on behalf of themselves and all members-descendants of the Gay Head Tribe against 14 federal, state and private defendants, essentially seeking declarations as to tribal and reservation status, and declarations of petitioners' rights to commons therein. For a copy of the complaint see Special Submission filed herewith, (Appendix D-1). District Court jurisdiction was based on the Commerce and Treaty clauses of the United States Constitution; the federal common law; 5 U.S.C. § 701 *et seq.*; 25 U.S.C. § 177; and 28 U.S.C. §§ 1331, 1337, 1343, 1362.

This petition seeks review of a decision of the United States Court of Appeals for the First Circuit affirming dismissal for lack of standing under the Indian Nonintercourse Act (25 U.S.C. § 177) and holding Massachusetts may extinguish Indian title without federal consent.

The gist of petitioners' allegations is there has been continuous Aquinnah (now Gay Head) Indian occupation of their 3400 acre Reservation now known as the Town of Gay Head for approximately 4,000 years; that the Gay Head Tribe and their Reservation have been under the control of three successive sovereigns — the English Crown from about 1620 to 1781, the Commonwealth of Massachusetts from 1781 to 1789 and the United States of America from 1789 to the present time.

Although since about 1701, Indian title in Massachusetts could not be extinguished without central sovereign consent, and although both the Gay Head Tribe and the Gay Head Reservation were recognized in various official Federal and State reports during the 19th century, (App. D), by 1869 and 1870 Acts of the Massachusetts Legislature and without federal consent, the Gay Head Indians were purportedly stripped of their Indian status and emancipated from federal guardianship, the federal alienation restriction on their Reservation lands was purportedly released, State judicial allotment of their Reservation was purportedly authorized, and their federal Tribe was purportedly converted into a Massachusetts town, transferring thereto all tribal governing powers and assets, including land, funds, hunting and fishing rights and the like.

Pursuant to this federally unauthorized legislation, various judicial partitions have been made, various deeds granted, and a number of non-Indians have intruded onto the Gay Head Reservation.

Because the Gay Headers' tribal powers and assets had been usurped, they were a 'dispossessed tribe' with no legitimate governing body. But in 1974 a group of tribal members who

had formed the Wampanoag Tribal Council of Gay Head, Inc., a Massachusetts corporation, brought *Gay Head I*, an action now pending in the federal district court in Boston (CA No. 74-5826-Mc). This suit seeks return of only 230 acres of the Tribe's 3400 acre Reservation and none of its commons in fishing, hunting, beaches and the like. In 1981, the so-called Tribal Council, apparently following the lead of the Gay Head Taxpayers Association, a non-Indian group who had intervened in the suit, proposed a settlement which essentially preserved the status quo, in exchange for most limited tribal control over 230 acres of so-called common lands (the poorest land in the reservation) with possible limited use of an additional 175 acres now in federal bankruptcy court, a full release of all tribal claims in the remaining 3000 acres of the Reservation and all tribal commons in funds, fishing, hunting, trapping, beaches, shores, water, cliffs, burial grounds, monuments and the like, with accession to state and local control in all essential particulars.

Convinced the proposed settlement was essentially a sellout to the non-Indian interests not in the best interests of the Gay Head Tribe and its members, instant petitioners felt they had as much right to press their views within 'a dispossessed tribe' as the rival group behind *Gay Head I*. So in December 1981, petitioners filed instant suit claiming the Tribe's entire cause of action, both individually and as a class representing all members-descendants, joining all interested parties and seeking declarations as to tribal status and member rights in the *entire* 3400 acre Gay Head Reservation and *all* its appurtenant commons.

On December 17, 1982, without reasoned opinion, the district court dismissed petitioners' complaint for lack of standing, citing the need for tribal action and apparently not considering their class claim tribally representative. (App. B).

Three days later, petitioners moved to amend by rearranging and expanding the parties, thereby naming the Gay Head Tribe, the Wampanoag Nation and Ellsworth Oakley (Wam-

panoag Supreme Sachem) as plaintiffs. The district court denied without reason.

Reasons for Granting the Writ

Petitioners contend two Acts of the Massachusetts legislature in 1869 and 1870, passed without federal consent, violate the federal policy of absolute control over extinguishing Indian title.

The first, an Enfranchising Act, declares "all people... heretofore known as and called Indians" to be "citizens of the Commonwealth", with "all the rights, privileges and immunities", but, "subject to all the duties and liabilities of other citizens". Then, "all Indians" were empowered "to take, convey and transmit...all lands heretofore known as Indian lands", and probate judges were empowered to "partition" or "sell" Indian lands held in common. *See* Mass. Acts 1869, c. 463.

The second, an Incorporating Act, "abolished" the Gay Head Tribe, incorporated it as a Massachusetts town, transferred all Gay Head tribal powers, lands, funds, fishing and other rights to the town, made Gay Head part of certain state and federal political districts, and empowered superior court judges to "partition" or "sell" parts of the Gay Head Reservation. *See* Mass. Acts 1870, c. 213.

The First Circuit defends these two Massachusetts Acts with an unusual construct.

Styling Justice White's *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974) affirmance of Chief Justice Marshall's "strong pre-emptive interpretation of the Indian Commerce Clause" as "dicta" and not in line with "modern Indian law", the First Circuit challenges the proposition that the federal government has absolute control over extinguishing Indian title as an attribute of national sovereignty.

Reasoning that federal power over Indians and Indian lands does not work directly through federal sovereignty or the federal constitution but only through Congress' exercise

of its exclusive Indian power under the Indian Commerce Clause, the First Circuit contends Congress' 1834 modified Nonintercourse Act (25 U.S.C. § 177) discloses a federal interest in controlling *tribal* transactions in tribal land but *no* federal interest in controlling transactions in tribal land by members of those tribes, thereby leaving such individual Indian transactions open to state regulation.

On that basis, the First Circuit argues that in an area clearly outside any expressed federal interest and preemption and by having made its Indians citizens, Massachusetts "has a valid interest in maintaining the stability of land transactions entered into according to its law, in treating all its citizens equally, and in providing the same property rights to all its citizens." App. A10. So, the First Circuit continues, Massachusetts was justified in *giving* individual Indians fee title and the power to alienate land" as an effort "to *convey* the state's fee title to them and thereby grant them their lands in fee simple absolute." App. A7. In fact, the First Circuit concludes, this post-1789 legislation was "not [an effort] to *take* rights *from* the Indians", but rather "Massachusetts' own attempt to undo its earlier cases and statutes limiting the rights of Indians in their aboriginal lands to possessory title and invalidating conveyances of that title." App. A7-8. (Emphasis in original).

I. The Decision Below Directly Conflicts With This Court's Continuous Assertion of Absolute Federal Control Over Extinguishing Indian Title in Its *Johnson v. McIntosh*; *Worcester v. Georgia*; *Cherokee Nation v. Georgia*; *United States v. Santa Fe Pacific R. Co.*; *Oneida Indian Nation v. County of Oneida* and *Wilson v. Omaha Indian Tribe* Decisions.

The First Circuit's argument 194 years after Union that working through its general police power and pre-Union fee

title, Massachusetts can disregard federal supremacy and do as it will with Indians and Indian lands within its borders, is a startling throwback to pre-Civil War states-rights arguments flatly rejected by this Court in its formative years. *See Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810); *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 519 (1832). These cases emphatically established absolute federal supremacy over Indians and Indian lands in the 13 original States regardless of whether or not the States were deemed to have retained their pre-Union right of soil, fee title or right of preemption from their former sovereignty. And an unbroken line of post-Civil War opinions by this Court down to 1974 and 1979 affirm this seminal proposition without change. *See, Oneida Indian Nation v. County of Oneida, supra; Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 670-671 (1979); *see also United States v. Santa Fe Pacific R. Co.*, 314 U.S. 339 (1941).

That the central sovereign has absolute control and final say over Indian land transactions anywhere in the United States has been a settled part of North American Indian law since at least 1763.

A brief review of the history of English North American settlement demonstrates this proposition.

By agreement rooted in the discovery of North America in the late 1400s, England, with other interested European nations capable of mounting sea expeditions to 'discover' and 'claim' parts of the new continent, established the principle that the 'discoverer' would have exclusive right to the soil subject to the occupation of the natives, including the exclusive right to acquire the soil from them and establish settlements thereon.

Pursuant to this principle, large territories of North America were 'discovered' and 'claimed' in the name of the English King, who starting in 1606, eventually consummated

his claims by granting settlement rights to various companies including his 1628 Massachusetts Bay Colony Charter to the Rosewell group.

This charter, in 'absolute property' and with 'power of government', empowered the Rosewell group "to have, take, possess and acquire any landes" and "to make laws...for the government and ordering the said landes...and the people inhabiting...the same...."

Over the next 150 years, English settlements established along the Atlantic seaboard resulted in the 13 original colonies including Massachusetts. And clearing the way for these settlements necessarily included acquiring Indian title in the Crown's name.

But continued and widespread abuse of this delegated Crown power to extinguish Indian title fomented so much trouble with the Indians over the years,[1] it finally came to crisis. To defuse the situation, King George III issued his 1763 proclamation withdrawing the power from local colonial control and reclaiming it for the Crown, thereby establishing

[1] For example, right here in Massachusetts, in 1748 many of the Mashpees (a Wampanoag Tribe on Cape Cod) were deeply upset over efforts of certain non-Indians, under Massachusetts Bay Colony authority, to get their hands on some of the Mashpees' best land. Various petitions to the Royal Governor and the General Court seeking protection were of no avail. So in 1760, Reuben Cognehew, a Mohegan Indian who was teaching school on the Mashpee Reservation, took a personal interest and made his way by ship to England, got an audience with King George III, and personally presented the Mashpees' request for the King's protection. King George instructed his Royal Governor in Boston to look into the matter. Shortly thereafter, in 1763, the very year the King acceded to all Indian complaints from North America and issued his now famous Proclamation withdrawing local colonial power to extinguish Indian title, the Massachusetts General Court removed non-Indian overseers who had been trying to extinguish Indian title to choice parts of the Mashpee Reservation. Thus the personal intervention of the King restored full possessory rights to the Mashpees. *See* F. G. Hutchins, *Mashpee: The Story of Cape Cod's Indian Town (1979), pp. 73-74.*

the principle that from then on Indian lands could be alienated and Indian title extinguished only under central sovereign control:

> "And whereas great frauds and abuses have been committed in the purchasing lands of the Indians, to the great prejudice of our interests, and to the great dissatisfaction of the said Indians, in order therefore to prevent such irregularities for the future, and to the end the Indians may be convinced of our justice and determined resolution to remove all reasonable cause of discontent, we do . . . strictly enjoin and require, that no private person do presume to make any purchase from said Indians of any lands reserved to the said Indians within those parts of our colonies where we have thought proper to allow settlement; but that if at any time any of the said Indians should be inclined to dispose of the said lands, *the same shall be purchased only for us, in our name*, at some public meeting or assembly of these said Indians, to be held for that purpose by the governor or commander in chief of our colony respectively within which they shall lie; and in case they shall lie within the limits of any proprietaries, *conformable to such directions and instructions as we* or they *shall think proper to give for that purpose*." By the KING, GEORGE, R., A PROCLAMATION, Given at the Court of St. James, 7 October 1763 (emphasis added).

Twenty years later, by the 1783 Paris peace treaty which confirmed Washington's 1781 victory over Cornwallis, Great Britain relinquished all claim "to territory and government of the United States", and ceded to the 13 new States the Crown's power of government and right of soil, including its exclusive power to extinguish Indian occupancy of land not yet detribalized or individualized.

And in 1789 when the United States became operable, the 13 original States' Crown power over Indian lands passed to the United States.[2]

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[2] The extent of state power over Indian affairs even during the Confederation period has been questioned. *See Oneida Indian Nation v. New York*, 691 F.2d 1070 (2nd Cir. 1982). However, this case does not raise the issue of pre-1789 state action.

Speaking for this Court in 1823, Chief Justice Marshall affirmed absolute central sovereign control over extinguishing Indian title:

> "All our institutions recognize the absolute title of the crown, subject only to the Indian right of occupancy; and recognized the absolute title of the crown to extinguish that right." *Johnson v. McIntosh, 21 U.S. (8 Wheat.) at 588.*

And speaking for this Court in 1974, Justice White re-affirmed the proposition:

> "That right [of occupancy in the Indian tribes], sometimes called Indian title and good against all but the sovereign, *could be terminated only by sovereign act.* Once the United States was organized and the Constitution adopted, these tribal rights to Indian lands *became the exclusive province of the federal law. Indian title . . . was extinguishable only by the United States.*" *Oneida Indian Nation v. County of Oneida, supra,* 414 U.S. at 667 (emphasis added).

In other words, the very purpose of the Crown's 1763 withdrawal of delegated power to local government to extinguish Indian title was to stop local abuse of that power and to mitigate Indian dissatisfaction. Because "the people of the States where they are found are often their deadliest enemies", *United States v. Kagama,* 118 U.S. 375, 383 (1886), and because of "the loss of their lands . . . through overreaching by members of other races," *Alonzo v. United States,* 249 F.2d 189, 196 (10th Cir. 1957) cert. denied, 355 U.S. 940 (1958), the Indians were given special *federal* protection.

The very intensity of the opposition petitioners now meet in seeking a declaration of their rights, suggests the same hostility and the same need for central sovereign protection which produced the 1763 Proclamation are still at hand.

In any event, petitioners believe it is clear that absolute central sovereign control over extinguishing Indian title, reclaimed by King George in 1763 and passed to the 13 col-

onies in 1783, passed to the federal government as an attribute of national sovereignty when the United States became operable.

So petitioners believe the First Circuit's styling this Court's continued affirmance of the United States' absolute and exclusive right to extinguish Indian title as "dicta", to justify purported extinguishment of Indian title by Massachusetts, is fundamentally wrong.[3] Not only it denies this Court's supremacy, it denies petitioners a federal protection against local abuse and discrimination which has been theirs since at least 1763.

II. The Decision Below Directly Conflicts with this Court's Continuous Assertion of Exclusive Federal Control Over Emancipating Indians and Terminating Indian Tribes and Indian Reservations in Its *United States v. Rickert; United States v. Holliday; United States v. Nice* and *DeCouteau v. District County Court* Decisions.

In petitioners' view, Massachusetts' federally unauthorized 1869 assertion of jurisdiction over Indians and Indian lands within its borders by making the Indians citizens and giving them the right to freely alienate sections of tribal land inevitably had the de facto consequence of federally unapproved-emancipation, termination of tribe and reservation as well as extinguishing of Indian title.

As this Court has emphasized time and again, emancipating Indians and terminating Indian tribes as extinguishing Indian title are matters of *absolute federal control*. The need

[3] In order to justify its broad reading of State power over Indians and Indian lands, the First Circuit relies in part on *United States v. Franklin County*, 50 F.Supp. 152 (N.D.N.Y. 1943), App. A6, which has been overruled. *See Cayuga Indian Nation v. Cuomo*, 565 F.Supp. 1297, 1314-1315 (N.D.N.Y. 1983) and cases cited therein. The Court of Appeals also relies on "interest balancing" cases such as *New Mexico v. Mescalaro Apache Tribe*, 51 U.S.L.W. 4741 (U.S. June 13, 1983) which are inapposite – such an analysis has *never* been used where Indian *lands* are at issue.

for federal consent is a 'given' of federal Indian law. Trying to mask emancipation and termination as 'enfranchisement' is a device other states have tried without success:

> "It is said that the State has conferred upon these Indians the right of suffrage and other rights that ordinarily belong only to citizens, and that they ought, therefore, to share the burdens of government like other people who enjoy such rights. These are considerations to be addressed to Congress. It is for the legislative branch of the Government to say when these Indians shall cease to be dependent and assume the responsibilities attaching to citizenship. That is a political question, which the courts may not determine." *United States v. Rickert*, 188 U.S. 432, 445 (1903); *see also United States v. Holliday*, 70 U.S. (3 Wall.) 407, 419-420 (1866).

Insulating Indians from local control in North America goes back over 200 years:

> "The policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history." *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 168 (1973), *quoting Rice v. Olson*, 324 U.S. 786, 789 (1945).

And the same "frauds and abuses" that led to King George III's 1763 withdrawal of local control over extinguishing Indian title have prompted this Court to speak out in no uncertain terms. *See United States v. Kagama, supra; see also Alonzo v. United States, supra.*

Accordingly, it rests with Congress to determine the time and extent of emancipation, *United States v. Nice*, 241 U.S. 591, 598 (1916), and Congress has exclusive authority to terminate an Indian reservation. *DeCouteau v. District County Court*, 420 U.S. 425, 444 (1975). And absolute federal control over extinguishing Indian title is "rudimentary" and applies "in all of the States, including the original 13." *Oneida Indian Nation v. County of Oneida, supra*, 414 U.S. at 670.

A. *In Addition, The Decision Below Directly Conflicts With Like Assertion In Second And Fourth Circuit Decisions.*

Insofar as other Circuits are concerned, over in New York the federal courts have given short shrift to similar State attempts to interfere with Indians and Indian lands within their borders. Two excellent statements illustrate:

> "Accordingly it has been held that it is for Congress to say when the tribal existence shall be deemed to have terminated, and Congress must so express its intent in relation thereto in clear terms. Until such legislation by Congress, even a grant of citizenship does not terminate the tribal status or relieve the Indian from the guardianship of the government." *United States v. Boylan*, 265 F. 165, 171 (2nd Cir. 1920).
>
> "The reservation lands are held in common by the tribe, although individual members of the tribe may be in possession of a particular tract, and such possession is recognized by the tribe. But the lands are inalienable except with the concurrence and consent of the United States. An individual member of the tribe cannot convey title to any particular tract of reservation lands. . . . The Judicial sale by the referee and the referee's deed in the partition action ran counter to that principle and purported to convey title to reservation lands in fee simple. This is repugnant to governmental policy in regard to Indian reservations. If such sales are countenanced by the government there is a danger that in time the reservation will cease to exist as such. Congress has adopted a policy of continuing the tribal relations of Indians and their rights as distinct political communities, apart from state interference. *Congress alone may vary this policy. . . . Until such time as Congress sees fit to change it, any interference with it either by state legislation or by extension of the jurisdiction of the state courts over internal affairs of Indians on the reservation is an unlawful interference with a governmental function.*" *United States v. Charles*, 28 F.Supp. 346, 348-349 (W.D.N.Y. 1938). (Emphasis added).

And two equally excellent statements from the Fourth Circuit illustrate their view:

> "The action or assent of the United States is absolutely essential in order to enable the Indian tribes or bands, or individual members of the same, to renounce the dependent condition caused by the state of pupilage in which the Indians have been since the adoption of the federal constitution." *United States v. Boyd*, 83 F. 547, 553 (4th Cir. 1897).
>
> "[I]t is perfectly clear that an act of a state legislature cannot be allowed to interfere with the guardianship over these people which the United States has assumed, since Congress alone must determine the extent to which the immunities and protection afforded by tribal status are to be withdrawn." *Haile v. Saunooke*, 246 F.2d 293, 297-298 (4th Cir.), *cert. denied*, 355 U.S. 893 (1957).

So as petitioners see it, this Court made it clear in 1974, *see Oneida Indian Nation v. County of Oneida, supra*, that Indians and Indian lands in the 13 original States became as fully federalized in 1789 as the Tribes and their lands in the later admitted States. Accordingly, petitioners believe they, their Gay Head Reservation and their other tribal assets are entitled to the same federal judicial protection accorded their Indian brethren in the Second and Fourth Circuits — a protection this Court says covers all Indians and all Indian lands throughout the United States.

III. The Decision Below Directly Conflicts with this Court's Holding the 1834 Revision of the Indian Nonintercourse Act Releases Only Reserved Individual Parcels of Detribalized Treaty Land from Federal Alienation Restriction, in Its *Jones v. Meehan* Decision.

The First Circuit asserts "individual Indians [cannot] assert [Nonintercourse Act] rights on their own behalf", App. A3, because "the modified (1834) [Nonintercourse Act] in-

dicates that Congress consciously chose not [to supervise transactions involving individual Indians] but, rather, to limit its supervision . . . to transactions and lawsuits involving the tribes themselves." App. A10.

Despite petitioners calling the First Circuit's attention to this Court's exhaustive interpretation of Congress' 1834 deletion of "any Indian" from the Indian Trade and Intercourse Act in *Jones v. Meehan*, 175 U.S. 1 (1899), and despite petitioners' painstaking effort to demonstrate that Congress' 1834 revision dealt only with individual Indian transactions in *detribalized* treaty land — not with individual Indian transactions in *tribal* land, the First Circuit ignored both this Court's opinion and petitioners' briefing.

Congress' first Trade and Intercourse Act in 1790 (Act of July 22, 1790, ch. 33, section 4, 1 Stat. 138), a temporary measure, prohibited Indian land transactions "by any Indians or any tribe of Indians" without federal consent. The temporary reenactments in 1793, 1796 and 1799 and the first permanent enactment in 1802 were essentially the same, except the latter two (1799 and 1802) referred to "any Indian" in singular instead of plural.

But in 1834, Congress deleted the words, "any Indian" altogether:

> "No purchase, grant, lease or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity, in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution." Act of June 30, 1834, ch. 161., 4 Stat. 729.

And this version continues today (25 U.S.C. § 177).

In 1833, U.S. Attorney General Taney had ruled that reservations to individual Indians excepted from an 1832 Pottawatomie tribal cession to the United States by treaty, did not grant a full non-restricted fee to said individual Indians, thereby prohibiting alienation of their individual holdings without federal consent. 2 Ops. Atty. Gen. 587.

Presumably Congress felt the intent of the treaty reservations was otherwise, and wanted them honored. Hence the 1834 deletion. *Jones v. Meehan*, 175 U.S. at 12.

Commenting on the deletion, the Court suggested as Attorney General Garland had concluded 11 years earlier, 18 Ops. Atty. Gen. 486, that tribal land could no more be alienated by a member of a tribe than by the tribe itself.

Then Mr. Justice Gray went on:

> "But the inference appears to us to be irresistible that Congress did not intend that there should thenceforth be any general restriction upon the alienation by individual Indians of sections of land reserved to them respectively by a treaty with the United States." 175 U.S. at 13.

In other words, the Court coupled the "cession reservation" in 1832, the "Taney opinion" in 1833, and the "Congressional deletion" in 1834 — and drew an "irresistible inference".

Then the Court concluded this Congressional intent was consistent with a series of Court opinions which held such "treaty reservations" converted the particular tribal holdings into individual property in full fee, free of alienation restriction:

> "The clear result of this series of decisions is that when the United States, in a treaty with an Indian tribe, and as part of the consideration for the cession by the tribe of a tract of country to the United States, make a reservation to a chief or other member of the tribe of a specified number of sections of land, whether already identified, or to be surveyed and located in the future, *the treaty itself converts the reserved sections into individual property; the reservation,* unless accompanied by words limiting its effect, *is equivalent to a present grant of a complete title in fee simple; and that title is alienable by the grantee at his pleasure,* unless the United States, by a provision of the treaty, or of an act of Congress, have expressly or impliedly prohibited or restricted its alienation." 175 U.S. at 21 (emphasis added).

In other words, such "full fee" treaty reservations are put on a par with special Acts of Congress and Executive patents, as a mode for granting unrestricted individual holdings of detribalized Indian land.

As petitioners explained to the First Circuit:

> "We think it most important to again emphasize Mr. Justice Gray's careful explanation in *Jones v. Meehan*, that the 1834 deletion *only took a special kind of federally detribalized land held by individual Indians out of the Nonintercourse Act* — namely — individual sections of land reserved by federal treaty.
>
> The key is — individual Indian "detribalized" rights versus individual Indian "derivative" rights.
>
> The treaty reservations themselves *detribalized* these individual sections of tribal land. They extinguished the sovereign alienation restriction that had been attached.
>
> Put another way —
>
> The 1834 deletion had absolutely *no bearing on individual Indian derivative rights in tribal land or its appurtenances* — or as they are also called — individual Indian rights to commons.
>
> And the local significance of this critical distinction is that *not one square foot of Indian land in Massachusetts has ever been detribalized* either by federal treaty reservation (as in *Jones v. Meehan*), or by federal executive patent or special Act of Congress (the only two other methods the United States uses to detribalize Indian land.)
>
> In short —
>
> *Indian land in Massachusetts remains tribal land* — and — *the federal alienation restriction remains attached.*
>
> Therefore, individual Indian derivative rights in tribal land in Massachusetts, as elsewhere in the United States, are still as fully protected under the Nonintercourse Act as under the Constitution and the federal Indian common law."

A. *In Addition, The Decision Below Directly Conflicts With Attorney General Garland's 1886 Opinion and Interior Department's Longstanding (100 Year) Policy That The Indian Nonintercourse Act Prohibits Federally Unauthorized Transactions In Tribal Land By Individual Indians As Well As By Their Tribes.*

In an opinion to the Interior Secretary nearly 100 years ago, Attorney General Garland advised:

> "Upon examination of the statutes and treaties, I feel justified in coming to the conclusion that it was the intention of Congress that the inhibition contained in section 2116, Revised Statutes [Nonintercourse Act], should have the same application to individual Indians that it has to the Indian nations and tribes." 18 Ops. Atty. Gen. 486, 487 (1886).

And citing this Court (*Jones v. Meehan*) and Attorney General Garland, the Interior Department Solicitor more recently emphasized Department policy: "If the tribe may not sell tribal land neither may the individual members sell tribal land or any interest therein." Op. Sol. I.D., November 21, 1942.

So in petitioners' view, *Jones v. Meehan* coupled with the Garland opinion and Interior policy, leaves no doubt the Nonintercourse Act prohibits *both* tribal *and* individual Indian transactions in tribal land without federal consent. Accordingly, petitioners believe individual Indians derivatively share their tribe's right under the Nonintercourse Act as well as under federal common law and the Constitution to litigate forbidden transactions in tribal land as in other wrongful dilution or invasion of tribal assets. Consequently, petitioners believe the First Circuit's opinion to the contrary is fundamentally wrong.

IV. The Decision Below Directly Conflicts with this Court's Recognition of Individual Indian Standing to Protect Derivative Interests in Tribal Assets in Its *Fellows v. Blacksmith* and *McClanahan v. Arizona State Tax Commission* Decisions.

Apparently the First Circuit does not agree central control over Indians and Indian lands passed to the United States as an attribute of national sovereignty. Nor do they acknowledge any federal Indian common law or feel the Indian Commerce Clause is self-executing. And because the Court of Appeals ignores *Jones v. Meehan, supra*, it does not understand that Congress' 1834 Nonintercourse Act revision *excluded only certain individual holdings in land detribalized by treaty* from the coverage of the Act. So the First Circuit assumes "the modified (1834) [Nonintercourse Act] indicates that Congress consciously chose not [to supervise transactions involving individual Indians] but, rather to limit its supervision under the [Act] to transactions and lawsuits involving the tribes themselves." App. A10. Having set these predicates, the First Circuit concludes petitioners have no standing whatsoever to protect their derivative rights in their tribe's land or other assets.

Petitioners suggest the root of the problem is that the First Circuit confuses two entirely different kinds of individual Indian land rights.

Individual Indian rights to a parcel of tribal land specifically detribalized and individualized by federal allotment or by federal treaty (as in *Jones v. Meehan*) or by special act of Congress (the only three ways Indian title can be extinguished and tribal land converted into private holdings), are one thing.

But individual Indian derivative rights to commons in tribal land and its appurtenances (fundamental in the Indian concept of each sharing in the whole), are quite another.

As petitioners pointed out earlier in instant petition, under *Jones v. Meehan* Congress' 1834 revision of the Nonintercourse Act lifted alienation restriction from Indian land detribalized and individualized by federal treaty. In other words, individualizing by treaty was put on a par with individualizing by executive patent and congressional act.

But as Attorney General Garland and the Interior Department Solicitor emphasize, the Nonintercourse Act continues to prohibit unauthorized transactions in tribal land by a member of the tribe as well as by the tribe itself. *See* 18 Ops. Atty. Gen. 486 (1886); Op. Sol. I.D., November 21, 1942; *see also United States v. Charles, supra.*

And the Attorney General's and Interior Solicitor's view of Nonintercourse Act scope is matched by this Court's view of Indian Commerce Clause scope:

> "Commerce with the Indian tribes means commerce with the individuals composing those tribes." *United States v. Holliday, supra*, 70 U.S. at 417.

And federal control over dealings with a member of the tribe is as absolute as with the tribe itself:

> "The right to exercise it [federal power] in reference to any Indian tribe or any person who is a member of such tribe, is absolute." *Id.* at 419.

Pursuant to these postulates, this Court early recognized the right of an individual Indian to protect his possessory share of his tribe's land.

For example —

Where a non-Indian, claiming under a post-1789 grant from Massachusetts, forcibly entered Blacksmith's farm on the 12,000 acre Tonawanda reservation in New York State and "with force and arms...expelled and dispossessed [him]", this Court stated,

> "[T]hat a forcible removal must be made, if made at all, under the direction of the United States." *Fellows v. Blacksmith*, 60 U.S. (19 How.) 366, 372 (1857).

And in a recent case, where an Indian asserted she had derivative standing to protect her reservation-derived income from state taxation, this Court stated:

> "To be sure, when Congress has legislated on Indian matters, it has, most often, dealt with the tribes as collective entities. *But those entities are, after all, composed of individual Indians, and the legislation confers individual rights.*" *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 181 (1973) (emphasis added).

A. *In Addition, The Decision Below Conflicts With Like Recognition In Eighth and Ninth Circuit Decisions.*

In stark contrast to the First Circuit's refusal even to acknowledge individual Indian derivative rights in tribal assets let alone standing to protect them, both the Eighth and Ninth Circuits have long acknowledged individual Indian rights to commons and their standing to protect those rights.

In 1912 for example, this Court let stand an Eighth Circuit case which asserted:

> "The tribal lands belonged to the tribe. The legal title stood in the tribe as a political society; but those lands were not held by the tribe as the public lands of the United States are held by the nation. They constituted the home or seat of the tribe. *Every member, by virtue of his membership in the tribe, was entitled to dwell upon and share in the tribal property.* It was granted to the tribe by the federal government not only as the home of the tribe, but as a home for each of the members." *Shulthis v. McDougal*, 170 F. 529, 533 (8th Cir. 1909), app. dismissed, 225 U.S. 561 (1912) (emphasis added).

And starting 13 years later, a series of Ninth Circuit cases followed suit:

> "The treaty was with the tribe, but the right of taking fish at all places within the reservation, and usual and accustomed grounds and stations outside the reservation, was plainly a right common to the members of the tribe — *the right to a common is the right of an individual of the community.*" *Mason v. Sams*, 5 F.2d 255, 258 (WD Wash. 1925) (emphasis added).
>
> "The individual [Indian] plaintiffs. . . have an interest in the controversy and have standing to maintain that action to assert that interest." *Sohappy v. Smith*, 302 F.Supp. 899, 904 (D.Or. 1969), aff'd and remanded, 529 F.2d 570 (9th Cir. 1976).
>
> "From *Mason* it is clear that an individual Indian enjoys a right of user in tribal property *derived* from the legal or equitable property right of the Tribe of which he is a member." *Kimball v. Callahan*, 590 F.2d 768, 773 (9th Cir.), cert. denied, 444 U.S. 826 (1979) (emphasis added).

Commenting on *Mason* in a 1940 law review article, Professor Cohen pointed out:

> "The decision in *Mason v. Sams* thus stands as a milestone in the defense of Indian rights. From this decision two conclusions may be drawn: (1) *that the individual Indian has a right to the use of a fair share of the assets of the tribe*; and (2) that the Indian bureau has no authority, in the absence of tribal agreement, to deprive any member of the tribe of the right to equal participation in tribal assets." F. S. Cohen, *Indian Rights and the Federal Courts*, 24 Minn.L. Rev. 145, 197-197 (1940) (emphasis added).

And in a recent updating of Professor Cohen's Handbook of Federal Indian Law, an editor comments on *Sohappy v. Smith*:

> "In [*Sohappy*] fourteen individual members of the Yakima Tribe sought a judicial definition of their right to fish at 'usual and accustomed' fishing grounds under an 1855 treaty. The state contended that because the fishing right was a tribal rather than an individual right, only the tribe could bring suit, but *the court held that the*

plaintiffs had standing to sue as individuals." Felix S. Cohen's Handbook of Federal Indian Law (1982 ed.), pp. 451-452 (emphasis added).

Interestingly, the concept of a right to a common and its recognition as a cognizable property right have long been state law in the First Circuit. *See Thomas v. Marshfield*, 27 Mass. (10 Pick.), 364, 366 (1830); *Kenyon v. Nichols*, 1 R.I. 106, 110 (1848).

Clearly then, both under this Court's *Holliday, Fellows* and *McClanahan* decisions and under 'rights of common' cases in the Eighth and Ninth Circuits, petitioners believe they have standing to seek declarations of Gay Head tribal status and their derivative commons in Gay Head tribal assets. And again, petitioners believe the First Circuit is fundamentally wrong to deny their rights and their standing under federal common law, the Indian Commerce Clause and the Nonintercourse Act.

V. The Decision Below Directly Conflicts with this Court's Recognition that Protection of Indian Possessory Rights Works Primarily through Federal Common Law and the Federal Constitution, in Its *Oneida Indian Nation v. County of Oneida* Decision and Its Acceptance of the Justice Department's Recommendation to Decline Review in *Mohegan Tribe v. Connecticut*.

As noted in a previous section of instant petition, the First Circuit holds petitioners have neither derivative standing under the Nonintercourse Act nor claim under the Indian Commerce Clause. And the First Circuit does not even mention petitioners' principal claim under federal common law, let alone discuss it.

In this Court's 1974 *Oneida* opinion, Mr. Justice White emphasizes that federal Indian law came into play as an attribute of central sovereignty:

"Once the United States was organized and the Constitution adopted, these tribal rights to Indian lands

> became *the exclusive province of the federal law*. Indian title, recognized to be only a right of occupancy, was extinguishable only by the United States. . . . The United States *also asserted* the primacy of federal law in the first Nonintercourse Act. . . . The rudimentary propositions that *Indian title is a matter of federal law and can be extinguished only with federal consent* apply in all of the States, including the original 13." *Oneida Indian Nation v. County of Oneida, supra*, 414 U.S. at 667, 670 (emphasis added).

And insofar as the Nonintercourse Act is concerned, the Justice notes it was an additional assertion of a federal primacy established at the time of Union.[4]

Seven years later, in spring 1981, responding to this Court's request (450 U.S. 1028) for their view on granting certiorari in *Mohegan Tribe v. Connecticut*, 638 F.2d 612 (2nd Cir. 1980), *cert. denied*, 452 U.S. 968 (1981), the Justice Department urged "the Court to decline review". Brief of the United States as *Amicus Curiae*, Connecticut v. Mohegan Tribe, U.S. Sup. Ct., No. 80-1365 (1981), p. 4.

Pointing out that the lower courts had upheld the Mohegan Tribe's Nonintercourse Act claim without reaching their constitutional or federal common law claims, the Justice Department stated:

> "One reason to doubt the recurring importance of the statutory question decided below is that the validity of Indian land sales, like those challenged here and in similar cases, most probably does not depend upon the coverage of the Nonintercourse Acts. . . . [Q]uite inde-

[4] In stating that "[t]he original enactment of the [Nonintercourse Act] in 1790 suggests that the First Congress did not believe that the Indian Commerce Clause — in an of itself — prohibited state laws validating Indian lan conveyances. Otherwise why would the [Nonintercourse Act] have been necessary?", App. , the First Circuit overlooks the historical purpose of the enactment, namely, to prevent crime. *See Cayuga Indian Nation v. Cuomo, supra*, 565 F.Sup. at 1320.

> pendently of any statutory restraint, Indian tribes have long been held disabled from alienating their lands without the concurrence of the national sovereign, and *any such attempted transaction is accordingly void as a matter of law, without reference to the Nonintercourse Acts*. . . .The exclusive authority of the federal government to extinguish Indian title is rooted in the Constitution itself and in the necessary attributes of sovereignty that passed to the federal government upon formation of the Union and adoption of the Constitution." *United States Mohegan Brief, supra*, pp. 4-7 (emphasis added).

The Justice Department concluded by emphasizing that this Court had "reaffirmed this rule most recently in *Oneida*. . . ." *Id.* at 5. Accordingly, this Court acceded to the Department's recommendation and declined review.

And just this year, in *Cayuga Indian Nation v. Cuomo, supra*, Federal District Judge Neal McCurn reaffirmed federal common law as the primary source of protecting Indian possessory rights:

> "To be sure, there is an unfortunate lack of specificity in early federal court cases involving Indian possessory rights as to the governing sphere — state or federal — which provided the right of action. . . .Nevertheless, it has long been clear that 'Indian title is a matter of federal law',. . .and, properly viewed, *it is federal common law that has implicitly supplied the right of action in federal possessory actions.*" *Id.*, 565 F.Supp. at 1319 (emphasis added).

Accordingly, petitioners believe the First Circuit's reliance on the Nonintercourse Act as the primary source of protecting Indian possessory rights to the exclusion of federal common law and the Constitution is entirely misplaced. And as Justice White points out, the Nonintercourse Act is just an add-on and clearly derivative of national sovereignty and the federal Constitution.

VI. THE DECISION BELOW DIRECTLY CONFLICTS WITH THE POLICY OF LIBERAL PLEADING AMENDMENT AFFIRMED BY THIS COURT'S *FOMAN V. DAVIS* RULING.

As stated, not satisfied that either the suit by a rival group within the 'dispossessed' Gay Head Tribe (*Gay Head I*) or its proposed settlement was in the best interests of the Tribe, petitioners brought instant suit (*Gay Head II*) on behalf of all members-descendants of the Gay Head Tribe, individually and as a class,[5] asserted the Tribe's entire cause of action in land and all other assets, and as required in declaratory proceedings, named all parties having any interest in the proceeding as defendants including the Tribe.

On 17 December 1982, the District Court, refusing to recognize petitioners' class claim as tribally representative and refusing to recognize individual Indian derivative rights of common or user in tribal assets, dismissed, stating:

> "The plaintiffs in this action lack standing to litigate their claims under the Nonintercourse Act, 25 U.S.C. § 177, since only an Indian nation or tribe may bring an action under that Act." App. B1-2.

Invoking this Court's policy of liberal pleading amendment, petitioners moved to amend their complaint on 20 December 1982, just three days after dismissal, proposing to restructure the parties by joining, *inter alia*, the Gay Head Tribe as a plaintiff. The district court denied their motion without opinion.

The First Circuit affirmed, holding that petitioners' class claim was not tribally representative, that petitioners had not originally named the tribe as a plaintiff, that under First Circuit precedent petitioners should have moved to amend before dismissal, and not having done so, should be bound by the consequences of their pre-dismissal strategy.[6] App. A12-13.

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[5] As argued to the First Circuit, petitioners considered their class claim tribally representative under *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1901) and other cases.

[6] The First Circuit stated the district court denied the motion to amend as "untimely". App. A12. However, the district judge merely wrote "denied" on the motion without *any* supporting reason.

Twenty years ago, this Court struck down a similar First Circuit posture:

> "Rule 15(a) declares that leave to amend 'shall be freely given when justice so requires'; this mandate is to be heeded. See generally, 3 Moore, Federal Practice (2d ed. 1948), sec.'s 15.08, 15.10. If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared person — such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. — the leave sought should, as the rules require, be 'freely given.' Of course, the grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules." *Foman v. Davis* 371 U.S. 178, 182 (1962).

Accordingly, petitioners believe the First Circuit's view denies them procedural and substantive due process.

Conclusion

For the reasons stated, petitioners believe they should be granted review.

Respectfully submitted,

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Appendix A

United States Court of Appeals
For the First Circuit

No. 83-1026

FRANK B. JAMES, ET AL.,
PLAINTIFFS, APPELLANTS,

v.

JAMES G. WATT, ET AL.,
DEFENDANTS, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[HON. JOHN J. MCNAUGHT, *U.S. District Judge*]

Before
COFFIN and BREYER, *Circuit Judges*,
and SELYA,* *District Judge*.

Robert C. Hahn, with whom *William A. Hahn*, and *Hahn & Matkov* were on brief, for appellants.

Allan van Gestel, with whom *Andrew S. Hogeland*, and *Goodwin, Procter & Hoar* were on brief, for appellees Christopher S. Look, Jr., as Sheriff of Dukes County, Beverly W. King, as Register of Deeds for Dukes County, and Alexander D. Forger, Trustee.

Thomas N. Tureen, with whom *Tureen & Margolin* was on brief, for appellee Wampanoag Tribe of Gay Head.

Thomas R. Kiley, Assistant Attorney General, with whom *Francis X. Bellotti*, Attorney General, and *Paul R. Matthews*, Assistant Attorney General, were on brief, for appellee Commonwealth of Massachusetts.

Jacques B. Gelin, Attorney, Department of Justice, with whom *Carol E. Dinkins*, Assistant Attorney General, *William F. Weld*, United States Attorney, and *Anne S. Almy*, Attorney, Department of Justice, were on brief, for appellee United States Secretary of Interior.

August 24, 1983

* Of the District of Rhode Island, sitting by designation.

BREYER, *Circuit Judge.* The plaintiffs in this case are individual Indians who claim an interest in land on Gay Head Peninsula, Martha's Vineyard, Massachusetts. In order to prevail, they must upset the present landowners' chain of title by showing that certain conveyances made many years ago by the Gay Head Indian tribe (or by individual Indians) are invalid. The district court granted summary judgment against the plaintiffs, from which they appeal. We find that the district court was correct.

A

The plaintiffs' initial argument is based upon the Indian Nonintercourse Act (the INA) — a federal statute that provides:

> No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution.

25 U.S.C. § 177. The plaintiffs argue that the relevant conveyances were not made pursuant to a "treaty or convention," that Massachusetts law could not authorize what the INA forbade, and that the conveyances are therefore invalid. The district court correctly rejected this argument, however, on the ground that the plaintiffs sued as individual Indians, The plaintiffs did not seek to represent the tribe, nor did they name the tribe as a plaintiff in the suit. We are not certain why they did not do so. But we know that the Gay Head Indian tribal government earlier filed a related suit by, and on behalf of, the Gay Head tribe; and we believe that plaintiff Indians here are dissidents who disapprove of the way that suit is being handled. This litigation strategy apparently played a role in the framing of their complaint.

Regardless, this court has held that the INA was designed to protect the land rights only of *tribes*; that the INA

therefore granted a cause of action to tribes; and that individual Indians could not assert INA rights on their own behalf. *See Epps* v. *Andrus*, 611 F.2d 915, 917 (1st Cir. 1979); *Mashpee Tribe* v. *New Seabury Corp.*, 592 F.2d 575, 581 (1st Cir. 1979), *cert. denied*, 444 U.S. 866 (1979); *see also Mashpee Tribe* v. *Watt*, 542 F. Supp. 797, 803 (D. Mass. 1982), *aff'd*, 707 F.2d 23 (1st Cir. 1983); *Oneida Indian Nation* v. *County of Oneida*, 434 F. Supp. 527, 537 (N.D.N.Y. 1977); *Narragansett Tribe of Indians* v. *Southern Rhode Island Land Development Corp.*, 418 F. Supp. 798, 803 (D.R.I. 1976). In *Epps* v. *Andrus*, 611 F.2d at 917 (original in ital.), we explicitly stated that to invoke the INA a plaintiff "must show that . . . it is or represents an Indian 'tribe' within the meaning of the Act. . . ." That holding is *stare decisis* in this circuit, and we shall not reexamine it. Thus, plaintiffs' claim, insofar as it is based on the INA, must fail.

B

The plaintiffs raised another argument below, which they now press strongly on appeal. They argue that the Indian Commerce Clause, U.S. Const. art. 1, § 8, automatically (in and of itself, without the INA) invalidated the Massachusetts statutes permitting the conveyances in question. *See* 1870 Mass. Acts ch. 213; 1869 Mass. Acts ch. 463; 1862 Mass. Acts ch. 184, and that the conveyances were therefore invalid. The Indian Commerce Clause grants to Congress the "Power . . . To regulate Commerce . . . with the Indian Tribes. . . ." In the plaintiffs' view, this grant of power is exclusive, and took from Massachusetts *all* power to legislate in the area of Indian affairs.

Plaintiffs' proposed interpretation of the *Indian* Commerce Clause closely resembles James Madison's view of the *Interstate* Commerce Clause, U.S. Const. art. 1, § 8. Madison, believing it essential that states not be able to restrict trade among themselves, *The Federalist* No. 42 (J. Madison); 3 *The*

Records of the Federal Convention of 1787 at 478, 547-48 (M. Farrand ed. 1937), apparently thought that the mere existence of the Clause precluded state legislation regulating interstate commerce, regardless of whether Congress chose to exercise its own power to legislate. *See id.*; L. Tribe, *American Constitutional Law* § 6-3 (1978); Eule, *Laying the Dormant Commerce Clause to Rest*, 91 Yale L. J. 425, 431 (1982); *cf.* Tribe, *Toward A Syntax of the Unsaid: Construing the Sounds of Congressional and Constitutional Silence*, 57 Ind. L. J. 515, 521 (1982) [hereinafter cited as "Tribe, *Silence*"]. In *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 209 (1824), Chief Justice Marshall, following the Madisonian interpretation, suggested that the Clause not only grants Congress regulatory power over interstate commerce, but also "excludes, necessarily, the action of all others that would perform the same operation on the same thing." Soon after Chief Justice Marshall's tenure, however, the Supreme Court began to expand the area in which states were free to act. *See, e.g., The License Cases*, 46 U.S. (5 How.) 504, 573-74 (1847); L. Tribe, *American Constitutional Law* § 6-3. And, modern cases use a particularized analysis, weighing the strength of relevant state and federal interests, to determine whether or not the Interstate Commerce Clause forbids a particular state law as an unconstitutional "burden" on interstate commerce. *See, e.g., Cities Service Gas Co.* v. *Peerless Oil & Gas Co.*, 340 U.S. 179, 186-87 (1950); *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761, 770-71 (1945); L. Tribe, *American Constitutional Law* § 6-5. Thus, the strong Madison/Marshall "preemptive" view of the Interstate Commerce Clause is no longer the law of the land. *See* L. Tribe, *American Constitutional Law* §§ 6-4 to 6-26.

Similarly, in citing Chief Justice Marshall's strong, preemptive interpretation of the *Indian* Commerce Clause, plaintiffs overstate the force of the Clause under modern Indian law. In *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832), for example, the Chief Justice wrote that "[t]he whole intercourse

between the United States and this [Cherokee] nation, is, by our constitution and laws, vested in the government of the United States." *See also Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 19 (1831) (Marshall, C.J.). Nevertheless, despite similar dicta in some later cases, *see, e.g., Oneida Indian Nation* v. *County of Oneida*, 414 U.S. 661, 670 (1974), Supreme Court decisions since Chief Justice Marshall's time have generally rejected the concept that the Clause automatically and necessarily preempts all state laws dealing with Indians. Instead, these decisions have tended to expand the area in which states may legislate. *See, e.g., Rice* v. *Rehner*, 51 U.S.L.W. 5141, 5144-46 (U.S. July 1, 1983); *Moe* v. *Confederated Salish & Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463, 481 n.17 (1976); *Organized Village of Kake* v. *Egan*, 369 U.S. 60, 74-76 (1962); *United States* v. *McGowan*, 302 U.S. 535, 539 (1938); *New York* v. *Dibble*, 62 U.S. (21 How.) 366, 370 (1858). And, when the Supreme Court has found state legislation preempted, it has used an analysis that balances the interests of the federal, state, and tribal authorities, rather than any rule that automatically preempts state statutes on the basis of the Clause. *See, e.g., New Mexico* v. *Mescalero Apache Tribe*, 51 U.S.L.W. 4741, 4743 (U.S. June 13, 1983); *Ramah Navajo School Board, Inc.* v. *Bureau of Revenue*, 50 U.S.L.W. 5101, 5102 (U.S. July 2, 1982); *White Mountain Apache Tribe* v. Bracker, 448 U.S. 136, 145 (1980); *McClanahan* v. *Arizona State Tax Commission*, 411 U.S. 164, 172 (1973). This shift in the method of analysis is fatal to plaintiffs' case for one simple reason: plaintiffs' only hope of success rests upon a strict, absolutist view of Indian Commerce Clause preemption. Any "interest balancing" approach — in view of the enactment of the INA — leads to the conclusion that the Indian Commerce Clause does not preempt the application of the relevant Massachusetts laws to this case.

To see why this is so, first imagine the circumstances in which plaintiffs' preemption argument would be strongest —

namely, if Congress had never enacted the INA. Even under those circumstances, one could make a strong argument for the validity of the state statutes — an argument based upon the special, bifurcated nature of Indian land title. That argument would run as follows:

As the Supreme Court noted in *Oneida Indian Nation* v. *County of Oneida*, 414 U.S. at 667, American courts recognize two distinct levels of ownership in Indian lands: fee title and Indian title. The common-law fee title passed to the European sovereign at discovery, and it could be transferred by him to his grantees. The fee title in lands that the British king retained passed to the individual states at the time of the revolution. These states, in turn, ceded to the central government their claims to the western territories beyond boundaries. Title to Indian lands within their borders, however, was retained by the thirteen original states. (To the extent that our comment in *Epps* v. *Andrus*, 611 F.2d at 916 suggests the contrary, it is withdrawn.) *See Oneida Indian Nation* v. *County of Oneida*, 414 U.S. at 670; *Seneca Nation* v. *Christy*, 162 U.S. 283 (1896); *United States* v. *Franklin County*, 50 F. Supp. 152, 156 (N.D.N.Y. 1943); Clinton & Hotopp, *Judicial Enforcement of the Federal Restraints on Alienation of Indian Land: The Origins of the Eastern Land Claims*, 31 Me. L. Rev. 17, 36 & n.73 (1979); Dwyer, *Land Claims Under the Indian Nonintercourse Act*, 25 U.S.C. § 177, 7 B.C. Env. Aff. L. Rev. 259, 265 n.41 (1978); *cf.* M. Jensen, *The Articles of Confederation* 198-238 (1966) (historical background to land cessions).

Indian title, which gave Indians a "right of occupancy," coexisted with the fee title. This "right of occupancy" was legally significant in several ways. For one thing, only the sovereign (the king, the state, the federal government) could destroy this right; and, as long as the Indians retained it, ownership of the fee title brought with it no present right of possession. Rather, the fee owner "received a contingent future interest which ripened into a fee simple" only when

the Indians abandoned their possessory interest (or when the sovereign, holding fee title, took that *possessory* interest). F. Cohen, *Handbook of Federal Indian Law* 321 n.372 (1942). For another thing, the courts did not otherwise recognize transactions involving this "right of occupancy." Because the owner of fee title held the "exlusive right to extinguish" the "right of occupancy," *Johnson* v. *McIntosh*, 21 U.S. (8 Wheat.) 543, 585 (1823), efforts by Indians to convey their possessory rights were not recognized by American courts. Instead, one who purchased such rights from the Indians "incorporate[d] himself with them"; if the Indians chose to take their rights back, as far as the U.S. courts were concerned, that was up to them. *Id.* at 593. All these, and related rules, were explained by Chief Justice Marshall in *Johnson* v. *McIntosh*, and were reaffirmed in subsequent cases. *See, e.g., Oneida Indian Nation* v. *County of Oneida*, 414 U.S. at 667-74; *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272, 279-81 (1955); *United States* v. *Santa Fe Pacific Railroad Co.*, 314 U.S. 339, 345-46 (1941); *United States* v. *Shoshone Tribe of Indians*, 304 U.S. 111, 115-16 (1938); *Cramer* v. *United States*, 261 U.S. 219, 229-30 (1923); *Buttz* v. *Northern Pacific Railroad*, 119 U.S. 55, 66-67 (1886); *Beecher* v. *Wetherby*, 95 U.S. 517, 525 (1877); *Mitchel* v. *United States*, 34 U.S. (9 Pet.) 711 (1835) (Marshall, C.J.); *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515 (1832) (Marshall, C.J.); *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1 (1831) (Marshall, C.J.); *Jackson* v. *Porter*, 13 F. Cas. 235, 240 (N.D.N.Y. Cir. Ct. 1825) (No. 7,143).

Against this background, one might argue that the Massachusetts statutes giving Indians fee title and the power to alienate land, were not efforts to *take* land rights *from* the Indians, but rather efforts to *convey* the state's fee title *to* them and thereby to grant them their lands in fee simple absolute. These statutes may have been Massachusetts' own attempt to undo its earlier cases and statutes limiting the rights of Indians in their aboriginal lands to posessory title and

invalidating conveyances of that title. *See* 1701 Mass. Prov. Laws ch. 11; *The Book of the General Lavves and Libertyes Concerning the Inhabitants of the Massachusets* [*1660*], at 161 (statute enacted 1633), *reprinted in The Colonial Laws of Massachusetts* (1889 ed.); *City of Lynn* v. *Inhabitants of Nahant*, 113 Mass. 433, 449 (1873); *Commonwealth* v. *City of Roxbury*, 75 Mass. (9 Gray) 451, 478-79 (1857) *Brown* v. *Inhabitants of Wenham*, 51 Mass. (10 Met.) 495, 498 (1845); *Clark* v. *Williams*, 36 Mass. (19 Pick.) 499, 500-01 (1837). Thus, these statutes might be seen as part of an effort to remove the legal disabilities of the Indians and grant them full citizenship — as part of an effort that included the passage of an 1869 statutory provision granting Indians "all the rights, privileges and immunities" of state citizens, 1869 Mass. Acts ch. 463, § 1, and the ratification by Massachusetts of the Fourteenth Amendment in 1867.

We need not decide whether this explanation of the Massachusetts statutes would have been sufficient to render them constitutional, despite the Indian Commerce Clause, in a hypothetical world without the INA. One could still have attacked them as unconstitutional by arguing that, regardless of the motives of the Massachusetts legislature, the statutes allowed the Indians to convey title to their lands; that the Indian Commerce Clause was designed to place in the hands of the federal government the decision of whether to allow conveyances by Indians; and that the Clause therefore "froze" the lands rights of the various Indian tribes until either they voluntarily abandoned their lands or Congress voted to permit a conveyance. One could note, as well, that the question of "when the Indians are prepared to exercise the privileges and bear the burdens of one *sui juris*" is a matter that "rests with Congress." *United States* v. *Nice*, 241 U.S. 591, 598 (1916). On the other hand, one could have argued, in support of the statutes, that Massachusetts was entitled under its general police powers to provide a fair, expeditious, and judicially recognized mechanism for a tribe to convey its

possessory rights to its own members if it chose to do so, and that Massachusetts was entitled as fee owner to transfer its title to such members of the tribe. One might add that Massachusetts' primary objective was apparently to help integrate into the non-Indian community those individual Indians who wished to do so, and that it did this without interfering with the area of primary federal concern — the "commerce" between the "settlers" and the semi-autonomous tribes. We do not pretend to know who would have won this hypothetical argument. We wish only to point out that — even without the INA — the Massachusetts statutes are not *clearly* unconstitutional; rather, the outcome of the argument is uncertain. *See generally* Tribe, *Silence*, *supra*, (exploring difficulties of interpreting congressional failure to legislate).

Next consider how the relevant features of the constitutional argument change once one takes account of the fact that Congress passed and modified the INA, 1 Stat. 137 (1790); 4 Stat. 729 (1834), to allow Indian tribes to invalidate transfers of (fee or Indian) title to their lands, if the transfers were made without the specific approval of the federal government. For one thing, the constitutional question itself changes. The INA clearly preempts state statutes that conflict with its terms. But, the relevant question now is whether the Indian Commerce Clause preempts state statutes *outside* the INA's scope. For another thing, the INA reflects a congressional judgment about the weight of the relevant federal, state, and tribal interests — interests that the Supreme Court has instructed us to balance to determine whether the Indian Commerce Clause preempts a particular state enactment. *See Rice* v. *Rehner*, 51 U.S.L.W. at 5142-46; *New Mexico* v. *Mescalero Apache Tribe*, 51 U.S.L.W. at 4743-44; *Ramah Navajo School Board, Inc.* v. *Bureau of Revenue*, 50 U.S.L.W. at 5102; *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. at 145. That congressional judgment helps us conclude that this "balance" tilts decisively in favor of the application

of the state laws. First, the terms of the Indian Commerce Clause itself grant the federal government the authority to regulate commerce "with the Indian *tribes*." Although the federal government may choose to supervise transactions involving individual Indians, *see, e.g., United States* v. *Nice*, 241 U.S. at 600, the modified (1834) INA indicates that Congress consciously chose not to do so, but, rather, to limit its supervision under the INA to transactions and lawsuits involving the tribes themselves. These facts suggest that the federal interest in nontribal transactions is comparatively small. *Cf. New Mexico* v. *Mescalero Apache Tribe*, 51 U.S.L.W. at 4744 (to find whether a federal interest exists, examine whether the interest is "reflected in federal law").

Second, where individual Indians are involved, the state has a valid interest in maintaining the stability of land transactions entered into according to its laws, in treating all of its citizens equally, and in providing the same property rights to all of its citizens. These factors support Massachusetts' power to act in the area.

Third, the interest of the tribe itself is smaller *outside the area that the INA protects*. In this case, application of the state statutes against the plaintiffs will conflict with no claim that the tribe itself might assert, and will not "interfere with the Tribe's ability to exercise its sovereign functions." *Ramah Navajo School Board, Inc.* v. *Bureau of Revenue*, 50 U.S.L.W. at 5102. Given the lack of any substantial federal or tribal interests that significantly support preemption, "the State interests at stake are sufficient to justify the assertion of State authority." *New Mexico* v. *Mescalero Apache Tribe*, 51 U.S.L.W. at 4744.

Finally, even though " congressional intent" is not the "sole touchstone" of preemption analysis, *New Mexico* v. *Mescalero Apache Tribe*, 51 U.S.L.W. at 4744, it does support the enforcement of the state statutes in this case. The original enactment of the INA in 1790 suggests that the first

Congress did not believe that the Indian Commerce Clause — in and of itself — prohibited state laws validating Indian land conveyances. Otherwise, why would the INA have been necessary? The views and actions of the first Congress, made up of many of the Constitution's framers, are entitled to considerable weight in cases like this of constitutional interpretation. *See Wisconsin* v. *Pelican Insurance Co.*, 127 U.S. 265, 297 (1888), *quoted with approval in Marsh* v. *Chambers*, 51 U.S.L.W. 5162, 5164 (U.S. July 5, 1983). Moreover, Congress' modification of the INA in 1834, limiting its applicability to tribal conveyances, suggests that Congress believed that similar activities beyond the scope of the INA did not "stand[] as an obstacle to the accomplishment," *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941), of the objectives it hoped to accomplish through the statute. We should hesitate to find the federal interest in activities outside the scope of the statute "weighty" enough to warrant preemption in the face of such a contrary congressional suggestion. *See id.* at 70 ("object sought to be attained" by Congress is "important in considering ... whether supreme federal enactments preclude enforcement of the state laws"); *cf. Prudential Insurance Co.* v. *Benjamin*, 328 U.S. 408 (1946) (Congress can limit preemptive scope of Interstate Commerce Clause); *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761, 769 (1945) (same). *Compare Durousseau* v. *United States*, 10 U.S. (6 Cranch.) 307, 314 (1810) (statute affirmatively describing jurisdiction will "imply a negative" as to jurisdiction not described) *with Hines* v. *Davidowitz*, 312 U.S. at 74 (all state regulation preempted where Congress planned for "one uniform national registration system"). In sum, what we can infer about congressional intent supports the conclusion we reached by "weighing the interests" — that, at least after the enactment of the INA, the Indian Commerce Clause does not invalidate the Massachusetts statutes here in question. Since plaintiffs here cannot assert a claim that falls within the scope of the INA (see Part A *supra*), and since the Indian

Commerce Clause does not offer an independent ground for holding these conveyances invalid, the district court's dismissal of their claim was proper.

C

After their claims were denied below, plaintiffs moved to amend their complaint, *inter alia*, to include the Gay Head Tribe as a party plaintiff. The district court denied the motion as untimely. The plaintiffs appeal this ruling as well, but we find no basis for reversal. A motion to amend is normally made before judgment. Sometimes a later effort to amend might be proper. *See* 6 C. Wright & A. Miller, *Federal Practice and Procedure* § 1489 (1971). But here plaintiffs waited until they lost their case as individuals before moving to include the tribe as plaintiff *and* they offered no reason to explain why they did not move to amend sooner. Accordingly, their motion was properly denied. *Hayes* v. *New England Millwork Distributors, Inc.*, 602 F.2d 15, 19-21 (1st Cir. 1979); *Ondis* v. *Barrows*, 538 F.2d 904, 909 (1st Cir. 1976); *see United States Labor Party* v. *Oremus*, 619 F.2d 683, 692 (7th Cir. 1980); *Jackson* v. *American Bar Association*, 538 F.2d 829, 833 (9th Cir. 1976); *Landon* v. *Northern Natural Gas Co.*, 338 F.2d 17, 20 (10th Cir. 1964), *cert. denied*, 381 U.S. 914 (1965).

We have no reason to believe that the plaintiffs' failure to amend earlier was inadvertent. For one thing, their attorney here is the same attorney who handled the appeal in *Epps* v. *Andrus*, *supra*. Therefore, he was aware of the need to assert that a plaintiff "is or represents an Indian 'tribe.' " *Id.* at 917. For another thing, as previously mentioned, other Indians have brought a suit on behalf of the Gay Head tribe to obtain land on the peninsula, and they are presently in the process of settling their suit. The plaintiffs here disagreed with the plaintiffs in the other suit, but they evidently did not, or could not, name the tribe as a party plaintiff in this case because the other plaintiffs control the tribe. These facts sug-

gest to us that the pleadings in this case were drawn as part of a litigating strategy and plaintiffs showed the district court no reason why they should not be bound by the consequences of that strategy. In any event, the issue at stake — whether plaintiffs here have a right to upset the settlement entered into by the tribe and its other members — is more appropriately before us in another case appealed to this court, *Wampanoag Tribal Council of Gay Head, Inc.* v. *Town of Gay Head,* No. 83-1163, scheduled to be heard this September.

Under these circumstances, we find no abuse of the district court's discretion in its denial of plaintiffs' motion to amend the pleadings. To require the district court to permit amendment here would allow plaintiffs to pursue a case to judgment and then, if they lose, to reopen the case by amending their complaint to take account of the court's decision. Such a practice would dramatically undermine the ordinary rules governing the finality of judicial decisions, and should not be sanctioned in the absence of compelling circumstances. *See* 6 C. Wright & A. Miller, *supra,* at § 1489.

Plaintiffs' other claims are without merit, and were properly dismissed.

Affirmed.

Adm. Office, U.S. Courts — Addison C. Getchell & Son, Inc.

Appendix B

United States District Court
District of Massachusetts

CIVIL ACTION
No. 81-3204-MC

FRANK B. JAMES, ET AL.,
PLAINTIFFS
v.
JAMES G. WATT, ET AL.,
DEFENDANTS

MEMORANDUM AND ORDER

December 17, 1982

MCNAUGHT, D. J.

In this action, the plaintiffs, 102 individuals who claim to be members or descendants of members of the Wampanoag Tribe of Gay Head, claim the right to possession of all the lands of the Town of Gay Head. They allege violations of the Indian Nonintercouse Act, 25 U.S.C. § 177, the Constitution, and several federal statutes.

The defendants have moved to dismiss the complaint for failure to state a claim upon which relief can be granted. For the reasons which follow, all defendants' motions are allowed.

I. *Nonintercourse Act*

The plaintiffs in this action lack standing to litigate their claims under the Nonintercourse Act, 25 U.S.C. § 177, since

only an Indian nation or tribe may bring an action under that Act. *Epps v. Andrus*, 611 F.2d 915 (1st Cir. 1979); *Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575 (1st Cir. 1979); *Mashpee Tribe v. Watt*, 542 F. Supp. 797 (D. Mass. 1982). The plaintiffs have sued as individuals, not as a tribe or nation, and, therefore, their claims under the Nonintercourse Act must be dismissed.

II. *Other Claims*

All of the other claims of the plaintiffs are either dependent upon their Nonintercourse Act claim or are independently devoid of merit, including those claimed to arise from basic constitutional authority and federal common law.

(A) *Commerce Clause*

The Commerce Clause, U.S. Const. art. I, § 8, cl. 3, standing alone does not provide a cause of action such as plaintiffs assert here. This clause is simply the basis for the Nonintercourse Act, under which these individual plaintiffs cannot state a claim.

(B) *Supremacy Clause*

The Supremacy Clause, U.S. Const. art. VI, cl. 2, gives priority to federal law when it is in conflict with state law. It does not support direct causes of action. As Judge Skinner recently held, "Since plaintiffs have not shown the acts of the state to be in conflict with any federal laws affecting them as individuals, the Supremacy Clause does not apply." *Mashpee Tribe v. Watt*, 542 F. Supp. at 806.

(C) *Fifth and Fourteenth Amendments*

Since the Nonintercourse Act does not protect individual rights in the land claimed, the plaintiffs' claims that they were denied due process and equal protection by defendants' fail-

ures to grant them their rights under the Nonintercourse Act must be dismissed.

(D) *Claims under 42 U.S.C. § 1983, 25 U.S.C. §§ 1321(b) and 1322(b), 28 U.S.C. § 1360(b), and 18 U.S.C. § 1162(b).*

Since the plaintiffs have not shown the occurrence of a violation of federal law or the existence of some trust relationship or other restriction against alienation, they have no cause of action under any of these statutes. *See, id.*

(E) *Claims under 42 U.S.C. §§ 4331-4335 and 16 U.S.C. §§ 461-470n and 470aa-47011*

These statutes confer no substantive rights nor do they "provide for any cause of action applicable to the actions challenged by the plaintiffs." *Id.* at 807.

III. Since plaintiffs have failed to state any claim upon which relief may be granted, all defendants' motions to dismiss must be allowed. Plaintiffs' complaint, therefore, is dismissed as to all defendants.

[SIGNED] John J. McNaught
UNITED STATES DISTRICT JUDGE

Appendix C

List of Parties

FRANK B. JAMES, HOWARD W. JAMES, JILL JAMES HADD, JUNE T. MacDONALD, VIVIAN M. JAMES, SHIRLEY E. FREETHY, PAMELA E. SZAREK, NAOMI E. FREETHY, SHARON L. RYONE, ALLEN J. RYONE, DEREK T. RYONE, ANTHONY E. POLLARD, JOAN G. PATADAL, BEATRICE PATADAL, BARBARA B. GENTRY, BERTHA ROBINSON, DAVID GILES, ADRIANA G. IGNACIO, ONA IGNACIO, AMERA IGNACIO, ANA IGNACIO, ROBIN D. MacDONALD, ROLAND F. JAMES, BENJAMIN R. JAMES, DONNA A. SACHER, CARLA CUCH, CAMERON CUCH, DAVID CUCH, RUSSELL R. GENTRY, ANYA N. GENTRY, ADRIAN S. GENTRY, IDA V. COLBY, LEWIS A. COLBY, MELVIN E. COLBY, ERIC COLBY, MICHAEL D. COLBY, BERTA WELCH, RODNEY W. SMALLEY, RICHARD HASKINS, ERNEST T. HASKINS, KENNETH SCHLOSSER, ERIC SCHLOSSER, MARCUS A. SCHLOSSER, LOIS SCHLOSSER, LEWIS A. COLBY, JR., HENRY DIAMOND, BERTHA J. MINOR, EDNA BOSWELL, GERTRUDE BOARDLY BOSWELL, DELMAR E. HASKINS, WILLARD MARDEN III, CYNTHIA VANDERHOOP AKINS, ARTHUR W. LOPES, JR., SHIRLEY JARDIN, DARYL LOPES, CARLA LOPES, BARRY LOPES, HEIDI LOPES, C. EARL VANDERHOOP, EDITH E. VANDERHOOP, ALFRED A. VANDERHOOP, BEATRICE GENTRY, THELMA WEISSBERG, HELEN MANNING, FRANK MANNING, ANITA JAMES WILSON, TONY JARDIN,

MARK JARDIN, CHRISTI JARDIN, RANDY JARDIN, AMY JARDIN, BECKY JARDIN, ABBY JARDIN, WALLACE MARDEN, ROBERT MARDEN, RAYMOND SMALLEY, F. DANA SMALLEY, RAYMOND SMALLEY, JR., ALFRED SMALLEY, ALFRED ALDRICH SMALLEY, VICTOR CRAIG SMALLEY, CYNTHIA BERNADETTE SMALLEY, TAMARA JARDIN, PIA JARDIN, SHERRI JARDIN, ROBERT S. PETERS, ELIZABETH ANN METELL, DOUGLAS E. VANDERHOOP, C. JUSTIN VANDERHOOP, KEM B. HOPKINS, HAROLD HOPKINS, HAROLD W. HOPKINS, MILTON JEFFERS, LOWELL JEFFERS, LINDA JEFFERS, IRVING JEFFERS, SHIRLEY JEFFERS, ROBERT JEFFERS, CECELIA RUBINACCI, BARBARA VIGER, SUSAN PORTER, JO-ANN RUBINACCI, GAY HEAD INDIAN RESERVATION

PLAINTIFFS

v.

JAMES G. WATT, WILLIAM WELD, WILLIAM I. RANDALL, MARILYN M. SULLIVAN, JOHN E. FENTON, JR., JOHN J. MACDOUGALL, JR., CHRISTOPHER S. LOOK, JR., BEVERLY W. KING, ALEXANDER D. FORGER, COMMONWEALTH OF MASSACHUSETTS, TOWN OF GAY HEAD, GAY HEAD TRIBE, WAMPANOAG TRIBAL COUNCIL OF GAY HEAD, INC., GLADYS WIDDISS, DONALD WIDDISS

DEFENDANTS

Appendix D

(Separate Submission at Filing)

1. Complaint
2. Federal Answer
3. Morse Report
4. McKenney Report
5. Congressional Report
6. Schoolcraft Report
7. Earle Report